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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON

7 LA TRISA ESPINO,

8 Plaintiff,

9 v.

10 COMMISSIONER OF SOCIAL  
SECURITY,

11 Defendant.

NO: 1:16-CV-3055-RMP

ORDER DENYING PLAINTIFF'S  
MOTION AND GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

12  
13 **BEFORE THE COURT** are cross-motions for summary judgment from  
14 Plaintiff La Trisa Espino, ECF No. 13, and the Commissioner of Social Security (the  
15 "Commissioner"), ECF No. 14. Ms. Espino seeks review of the Commissioner's  
16 final decision denying her claims for disability insurance benefits under Title II of  
17 the Social Security Act (the "Act") and supplemental security income under Title  
18 XVI of the Act. The Court has reviewed the motions, Plaintiff's reply  
19 memorandum, the administrative record, and is fully informed. The motions were  
20 heard without oral argument. The Court concludes that substantial evidence  
21 supports the Commissioner's decision, and therefore grants Defendant's motion for  
ORDER DENYING PLAINTIFF'S MOTION AND GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT ~ 1

1 summary judgment, ECF No. 14, and denies Plaintiff's motion for summary  
2 judgment, ECF No. 13.

### 3 **BACKGROUND**

#### 4 **A. Ms. Espino's Claim for Benefits and Procedural History**

5 Ms. Espino applied for disability insurance benefits on December 13, 2011,  
6 alleging that she had become disabled on February 27, 2009. Plaintiff also  
7 protectively sought supplemental security income, through an application filed the  
8 same date. Plaintiff listed the following as conditions that "limit [her] ability to  
9 work": back injury; blood clots; high blood pressure; and depression. ECF No. 9-6  
10 at 268.<sup>1</sup> Her application was denied initially on April 16, 2012, and at the  
11 reconsideration level on April 3, 2013. ECF No. 9-3 at 78. Ms. Espino requested a  
12 hearing before an administrative law judge ("ALJ"). ECF No. 9-4 at 184. Social  
13 Security ALJ Larry Kennedy held a hearing in Yakima, Washington, at which Ms.  
14 Espino and a vocational expert testified, and Ms. Espino's attorney presented closing  
15 argument. In a decision issued on November 24, 2014, ALJ Larry Kennedy found  
16 Plaintiff not disabled. ECF No. 9-2 at 17, 35. The ALJ's decision became the final  
17 decision of the Commissioner when the Appeals Council denied Ms. Espino's

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19 \_\_\_\_\_  
20 <sup>1</sup> The page numbers refer to the consecutively paginated numbers across the  
21 Administrative Record filed in this matter at ECF No. 9.

1 request for review on February 24, 2016. ECF No. 9-2 at 1; *see also* 20 C.F.R. §  
2 404.981, § 416.1481.

3 Plaintiff appealed the ALJ's decision to this Court on April 8, 2016, and  
4 received authorization to proceed *in forma pauperis*, without payment of the filing  
5 fee. ECF Nos. 2 and 3. Plaintiff moved for summary judgment on October 5, 2016,  
6 and the Commissioner filed a cross-motion for summary judgment on November 16,  
7 2016. ECF Nos. 13 and 14.

#### 8 **B. September 23, 2014 Hearing**

9 Ms. Espino was represented by attorney Robert Tree at her hearing before the  
10 ALJ on September 23, 2014. ECF No. 9-2 at 44; Tr. at 2. Ms. Espino testified that  
11 she was 35 years old at the time of the hearing. ECF No. 9-2 at 48; Tr. at 6. She  
12 completed the eleventh grade. ECF No. 9-2 at 44; Tr. at 6. At the time of her  
13 hearing, Ms. Espino stated that she lived in a rented house in Yakima with her two  
14 children, her sister, and her sister's girlfriend. ECF No. 9-2 at 51; Tr. at 8. Her  
15 sister helped Ms. Espino care for her children. ECF No. 9-2 at 58; Tr. at 16.

16 Plaintiff's most recent formal employment ended approximately five years  
17 before the hearing. Ms. Espino worked in 2009 as a childcare assistant at a  
18 preschool. ECF No. 9-2 at 51; Tr. at 9. In 2008, she was self-employed in a similar  
19 line of work, providing childcare for three preschool-aged children out of her home.  
20 ECF No. 9-2 at 51-52; Tr. at 9-10. From approximately 2007 until 2008, Ms. Espino  
21 worked as a fruit sorter at a warehouse in Yakima. ECF No. 9-2 at 52; Tr. at 10.

1 Ms. Espino also previously had worked at Liquidation Outlet stocking inventory and  
2 at a tavern as a bartender. ECF No. 9-2 at 53; Tr. at 11.

3 From Ms. Espino's date of alleged onset in February 2009 until the date of the  
4 hearing, she lived in Yakima and Las Vegas, Nevada. Ms. Espino recalled at the  
5 hearing that she moved to Las Vegas "for a couple of years" from approximately  
6 2009 until she returned to the Yakima area at the end of 2010. ECF No. 9-2 at 53-  
7 54; Tr. at 11-12. Ms. Espino explained that she went to Las Vegas to avoid  
8 exposing her children to the drug abuse that she was struggling with at the time.  
9 ECF No. 9-2 at 54; Tr. at 12. Plaintiff recalled that she continued to use street drugs,  
10 specifically crack cocaine, throughout her time in Las Vegas and supported her  
11 usage by engaging in informal employment. ECF No. 9-2 at 54-55; Tr. at 12-13.  
12 Ms. Espino estimated that she spent approximately 50 to 100 dollars per day on  
13 drugs during the period in which she was in Las Vegas. ECF No. 9-2 at 55-56, Tr. at  
14 13-14. Ms. Espino testified that since returning to Washington State in 2010, she  
15 had not "left the state at all, period." ECF No. 9-2 at 56; Tr. at 14.

16 Ms. Espino testified that upon returning to Yakima, she had a filter inserted  
17 into an artery to address a blood clot she developed while in Nevada. ECF No. 9-2  
18 at 57; Tr. at 15. She denied purchasing street drugs since her return but  
19 acknowledged that she had used marijuana as recently as approximately one week  
20 before the hearing. ECF No. 9-2 at 57-58, 65; Tr. at 15-16, 23.

1           The ALJ asked Ms. Espino to describe her daily routine. ECF No. 9-2 at 58;  
2 Tr. at 16. Ms. Espino testified that she spent the majority of her day reclined in bed  
3 or on the couch at her home. ECF No. 9-2 at 58; Tr. at 16. She described being able  
4 to complete small, brief tasks around the house such as cooking or cleaning. ECF  
5 No. 9-2 at 58; Tr. at 16. When asked by the ALJ how long she had felt the need to  
6 remain at home most of the time, Ms. Espino responded that this had been her  
7 practice since returning to Yakima from Las Vegas. ECF No. 9-2 at 59; Tr. at 17.  
8 She testified that she rarely drove, representing that her last time driving a car was  
9 eight months before the hearing. ECF No. 9-2 at 60; Tr. at 18.

10           Ms. Espino testified that she had her second back surgery in 2013, followed  
11 by physical therapy, although she had ceased physical therapy and the  
12 accompanying home exercises by the time of the hearing. ECF No. 9-2 at 59-60; Tr.  
13 at 17-18. She described her mobility as getting worse after the surgery, with even  
14 more time spent lying down. ECF No. 9-2 at 60-61; Tr. at 18-19. She described  
15 experiencing an uncomfortable pulling sensation when she sat and difficulty  
16 standing for longer than fifteen minutes at a time before needing to rest for  
17 approximately one hour to one and one-half hours to relieve the pain. ECF No. 9-2  
18 at 61-63; Tr. at 19-21.

19           In response to questioning from her attorney, Ms. Espino recalled that her  
20 treating physician in 2012 stopped prescribing her narcotic pain medications out of  
21 concerns regarding her drug abuse. ECF No. 9-2 at 64; Tr. at 22. When Ms.

1 Espino's attorney asked her to clarify when she last used crack cocaine, she testified  
2 that she used it in 2009. ECF No. 9-2 at 64; Tr. at 23.

3 The ALJ also examined Kimberly Mullinax, a vocational expert. ECF No. 9-  
4 2 at 65; Tr. at 23. First, the ALJ asked Ms. Mullinax to classify Ms. Espino's past  
5 work according to the Dictionary of Occupational Titles ("DOT"). ECF No. 9-2 at  
6 66; Tr. at 24. Ms. Mullinax classified Ms. Espino's work as follows: for her work as  
7 a bartender, the DOT is 312.474-010, with an SVP<sup>2</sup> of three requiring only light  
8 strength, but, as performed, medium; for her work as a nursery school attendant, the  
9 DOT is 359.677-018, with an SVP of four and a need for light strength; for her work  
10 as an agricultural produce sorter, the DOT is 529.687-186, with an SVP of two, and  
11 strength is light; for her work as a child monitor, the DOT is 301.677-010, with an  
12 SVP of two and requiring medium strength; and for her work as a stock clerk, DOT  
13 is 299.367-014, with an SVP of four and a need for heavy strength. ECF No. 9-2 at  
14 66; Tr. at 24.

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15 <sup>2</sup> "SVP" refers to the level of "specific vocational preparation" required to learn a  
16 job. Jobs with an SVP of one to two are unskilled and require as little as a short  
17 demonstration or as much as one month to develop the requisite skills. Jobs with  
18 an SVP of three to four are semi-skilled and require between one month and six  
19 months to learn. Jobs with an SVP of five or higher are skilled. *See* Social  
20 Security Ruling 00-4p, 2000 SSR LEXIS 8.  
21

1           The ALJ asked Ms. Mullinax to assume a hypothetical individual with the  
2 same age, education, and work experience as Ms. Espino. The ALJ described the  
3 hypothetical individual as demonstrating the following residual functional capacity:  
4 “could do light work as that’s defined by the Regulations; could occasionally  
5 balance, stoop, kneel, and crouch; no ladders, ropes, or scaffolds; no ramps or stairs;  
6 no crawling . . . would avoid concentrated exposure to extreme cold, extreme heat,  
7 vibration, and hazards such as working at heights . . . would further be limited to  
8 simple, routine tasks . . . could follow short, simple instructions; could do work that  
9 needs little or no judgment; could perform simple duties that could be learned on the  
10 job in a short period.” ECF No. 9-2 at 67-68 at 25-26. Ms. Mullinax testified that,  
11 of Ms. Espino’s past work, the hypothetical person described could perform only the  
12 work of an agricultural produce sorter. However, Ms. Mullinax added that the  
13 hypothetical person with the same residual functional capacity as described could  
14 also work: as a “cashier II,” DOT 211.462-010, requiring light strength; as a cleaner  
15 or housekeeper, DOT 323.687-014, requiring light strength; or as a fast food worker,  
16 DOT 311.472-010, also requiring light strength. ECF No. 9-2 at 68; Tr. at 26.

17           The ALJ next asked Ms. Mullinax if a second hypothetical individual, with  
18 the same environmental and postural limitations as described in the first scenario,  
19 but with the ability to perform only sedentary, rather than light, work could perform  
20 any occupations. ECF No. 9-2 at 68; Tr. at 26. Ms. Mullinax agreed with the ALJ  
21 that none of Ms. Espino’s past work would be suitable for the second hypothetical

1 person. ECF No. 9-2 at 69; Tr. at 27. Ms. Mullinax offered as alternative  
2 occupations fitting the second hypothetical, with the sedentary restriction, the  
3 following: assembler, DOT 734.687-018; telephone information clerk, DOT  
4 237.367-046; and document preparer, DOT 249.587-018. ECF No. 9-2 at 69; Tr. at  
5 27.

6 Next, the ALJ asked Ms. Mullinax to consider suitable occupations for a third  
7 hypothetical residual function scenario in which the individual could perform light  
8 work but could not undertake any of the occasional postures outlined in the first  
9 hypothetical. ECF No. 9-2 at 69; Tr. at 27. Ms. Mullinax responded that the  
10 “cashier II” position from Ms. Espino’s work history still would conform to the  
11 limitations set out in the third hypothetical. ECF No. 9-2 at 69; Tr. at 27. Finally,  
12 the ALJ asked Ms. Mullinax to consider a fourth hypothetical individual who could  
13 perform only sedentary work without engaging in any of the postures outlined in the  
14 first scenario. ECF No. 9-2 at 69; Tr. at 27. Ms. Mullinax responded that all of the  
15 sedentary occupations that she had previously outlined still would be appropriate in  
16 the fourth hypothetical because the postural restrictions of the fourth hypothetical  
17 were within or below the work level for those occupations. ECF No. 9-2 at 70; Tr.  
18 at 28.

19 The ALJ then asked Ms. Mullinax what occupations would be suitable for a  
20 hypothetical person who was limited to infrequent and superficial interactions with  
21 members of the public. ECF No. 9-2 at 70; Tr. at 28. Ms. Mullinax testified that,



1 out of Ms. Espino's past work, the cashier role would suit the superficial public  
2 interaction limitation that the ALJ set out, but required frequent contact. ECF No. 9-  
3 2 at 71; Tr. at 29. Ms. Mullinax continued that the produce sorter,  
4 cleaner/housekeeper, document preparer, and assembler positions all conform to the  
5 public contact limitation in full. ECF No. 9-2 at 71-72; Tr. at 29-30.

6 Ms. Espino's attorney asked Ms. Mullinax to give an opinion on how many  
7 days of work an individual may miss before being fired from their job and on the  
8 effect of a person needing to take breaks to lie down on her ability to retain her job.  
9 ECF No. 9-2 at 72; Tr. at 30. Ms. Mullinax opined that "employers will tolerate, on  
10 average, one missed day of work per month, and that persistent and ongoing issues  
11 of unplanned missed work or leaving work early would lead to termination of  
12 employment." ECF No. 9-2 at 72; Tr. at 30. Ms. Mullinax testified that employees  
13 generally receive two breaks during the workday, each ten to fifteen minutes in  
14 length, in addition to a lunch break between thirty minutes and one hour long; she  
15 further surmised that an employer would not tolerate additional breaks on a  
16 persistent, ongoing basis. ECF No. 9-2 at 72; Tr. at 30.

17 The hearing concluded with Ms. Espino's attorney, Mr. Tree, making a  
18 closing statement. ECF No. 9-2 at 73; Tr. at 31. He argued that Ms. Espino's second  
19 back surgery had failed and that the objective medical records, including imaging  
20 done after her surgery, showed severely herniated discs that would result in the  
21

1 chronic low-back pain of which Ms. Espino complained, despite any other  
2 credibility issues raised by the record. ECF No. 9-2 at 73-74; Tr. at 31-32.

### 3 **C. Medical Records**

4 As for Ms. Espino's claim of debilitating depression and anxiety, the primary  
5 medical documents in the record consist of consultative examination report,  
6 prepared for DSHS by Dr. Thomas Genthe in April 2012. ECF No. 9-8 at 613-18.  
7 Dr. Genthe concluded that Ms. Espino exhibited depression symptoms, but not to the  
8 degree that the symptoms or treatment for those symptoms should interfere with  
9 everyday work or related tasks. ECF No. 9-7 at 617.

10 Regarding Ms. Espino's other claimed disabling ailments, the record as a  
11 whole reflects that Ms. Espino has a history of low-back pain, in addition to health  
12 problems related to pulmonary embolism and deep vein thrombosis, high blood  
13 pressure, Methicillin-resistant Staphylococcus aureus (MRSA), and obesity. Ms.  
14 Espino underwent her first surgery to address lumbar spine degeneration, with  
15 bulging and herniation at L4-5, in 2009. Although her condition initially improved  
16 following surgery, Plaintiff's lower back condition again deteriorated by the end of  
17 2012. In February 2013, Plaintiff again underwent back surgery to address spinal  
18 degeneration. At odds in the record are assertions from Ms. Espino, and to some  
19 degree her medical providers, that her back condition has worsened since her second  
20 surgery and medical imaging conducted in late 2013 that indicate that Ms. Espino's  
21 spinal degeneration has at least stabilized.

1 Dr. Ankur Rana saw Ms. Espino for an appointment to initiate care in January  
2 2012. Dr. Rana examined Ms. Espino and reviewed a spinal x-ray. ECF No. 9-8 at  
3 624-35. He also completed a “Medical or Disability Condition” evaluation for the  
4 Washington State Department of Social and Health Services (DSHS) on Ms.  
5 Espino’s behalf, declaring Ms. Espino unfit to work for twelve months because she  
6 was severely limited in her ability to stand, walk, or lift anything more than two  
7 pounds. ECF No. 9-8 at 633. However, in a follow-up visit in March 2012, Dr.  
8 Rana advised Ms. Espino not to restrict her daily activities and gave her a  
9 prescription to start physical therapy. ECF No. 9-7 at 621.

10 Dr. John Lyzanchuk began treating Plaintiff in 2013 and continued to see  
11 Plaintiff following her February 2013 back surgery and in monitoring Plaintiff’s  
12 other health conditions. In May 2013, Dr. Lyzanchuk completed a “Medical or  
13 Disability Condition” evaluation for the DSHS. ECF No. 9-7 at 775. Dr.  
14 Lyzanchuk opined that Ms. Espino’s pain and limited mobility prevented her from  
15 participating in any work or return-to-work activities. ECF No. 9-7 at 775. Dr.  
16 Lyzanchuk also concluded that Ms. Espino was severely limited in her ability to lift  
17 or carry anything over two pounds or to stand or walk. ECF No. 9-7 at 775. He  
18 anticipated that further evaluation would be necessary “pending final results of most  
19 recent surgery” and noted that Ms. Espino may require further medical assistance  
20 managing her pain. ECF No. 9-7 at 777.

1 The medical record is replete with further medical imaging, examination, and  
2 laboratory reports regarding Ms. Espino's conditions; most of the documents are  
3 addressed in the ALJ's decision.

#### 4 **D. Other Evidence**

5 Among other non-medical evidence in the record is an investigation report  
6 that was prepared by the Cooperative Disability Investigations Program (CDIP)  
7 following receipt of an anonymous tip regarding Plaintiff in approximately June  
8 2012, several months before Ms. Espino's second back surgery in February 2013.  
9 The investigation report was completed in November 2012 and concluded that Ms.  
10 Espino was able to function at a higher level than she acknowledged for purposes of  
11 her claims for Social Security and disability benefits. ECF No. 9-7. The report also  
12 referred to numerous inconsistencies related to Ms. Espino's symptoms, capabilities,  
13 and behaviors during the period from her alleged onset of disability and fall 2012.  
14 The report concluded that the witness statements, Ms. Espino's own statements to  
15 the investigator, and other information collected raised "serious questions of  
16 manipulation on [Plaintiff's] part for the purpose of drug seeking and secondary  
17 gain." ECF No. 9-7 at 4.

#### 18 **E. ALJ's Decision**

19 The ALJ issued his decision on November 24, 2014. ECF No. 9-2 at 17.  
20 After finding that Ms. Espino had accrued sufficient quarters of coverage to remain  
21 insured through June 30, 2010, the ALJ evaluated Ms. Espino's claim of disability

1 commencing on February 27, 2009, according to the five-step sequential evaluation  
2 process. ECF No. 9-2 at 20.

3 At step one, the ALJ found that Ms. Espino engaged in substantial gainful  
4 activity between her alleged onset date and the date of the decision. ECF No. 9-2 at  
5 21. The ALJ noted Ms. Espino's testimony that she was living in Las Vegas and  
6 using crack cocaine and her estimate that she spent between \$50 and \$100 on street  
7 drugs each day during that period. ECF No. 9-2 at 22. The ALJ extrapolated from  
8 the low end of Ms. Espino's estimated drug expenditure that she must have been  
9 earning at least \$1,500 per month. ECF No. 9-2 at 22. The ALJ concluded that Ms.  
10 Espino's presumptive earnings exceeded the threshold for substantial gainful activity  
11 in both 2009 and 2010. ECF No. 9-2 at 22-23. However, the ALJ also recognized  
12 that a twelve-month period had elapsed since Plaintiff's substantial gainful activity  
13 in Las Vegas during which she was not engaging in any substantial gainful activity.

14 Proceeding to step two, the ALJ recounted his review of the objective medical  
15 evidence, including medical imaging, laboratory, and treatment and examination  
16 reports, and found that Plaintiff's "lumbar degenerative disc disease causes more  
17 than minimal functional limitation and is a severe impairment as defined by the  
18 Social Security Administration." ECF No. 9-2 at 23. The ALJ found that Plaintiff's  
19 other physical impairments "contribute to her functional difficulties." ECF No. 9-2  
20 at 24. He determined that Plaintiff's deep vein thrombosis and pulmonary embolism  
21 also qualified as severe impairments for purposes of that Act. *Id.* In reviewing

1 Plaintiff's history related to these health conditions, the ALJ noted that when  
2 Plaintiff was hospitalized for insertion of her inferior vena cava (IVC) filter in May  
3 2011, she had been found to have a one-and-one-half-year period of noncompliance  
4 with her medication for the conditions prior to her hospitalization, but that records  
5 from November 2012 indicated that Plaintiff had subsequently complied with the  
6 treatment protocols. ECF No. 9-2 at 24. The ALJ found that Plaintiff's  
7 hypertension, obesity, and history of MRSA all are additional severe physical  
8 impairments that contribute to her functional difficulties. ECF No. 9-2 at 24. With  
9 respect to Ms. Espino's self-reported depression and anxiety, the ALJ reviewed a  
10 psychological evaluation of Plaintiff from April 2012 and concluded that any mental  
11 health issues that Plaintiff has cause "no more than minimal functional limitations."  
12 ECF No. 9-2 at 25.

13 At step three, the ALJ determined that Plaintiff's impairments or combination  
14 of impairments did not meet or medically equal the criteria of a listed impairment in  
15 20 C.F.R. Part 404, Subpart P, Appendix 1.

16 Therefore, the ALJ proceeded to step four and engaged in a two-step analysis  
17 for Plaintiff's impairments to determine the degree to which they: (1) were  
18 medically determinable and reasonably could be expected to cause the claimant's  
19 pain or other symptoms; and (2) limited claimant's functioning. ECF No. 9-2 at 27.

20 The ALJ reasoned that Ms. Espino's medically determinable impairments could  
21 cause the symptoms of which Plaintiff complains; however, the ALJ concluded that

1 “claimant’s statements concerning the intensity, persistence and limiting effects of  
2 these symptoms” were not fully credible. ECF No. 9-2 at 28.

3 The ALJ extensively recounted the evidence in the record upon which he  
4 relied in reaching his adverse credibility finding, including inconsistent statements  
5 by Ms. Espino to her medical providers as reflected in medical records, witness  
6 statements and conclusions of the investigator contained in the CDIP investigation  
7 report, and statements made by Ms. Espino at the hearing that contradicted other  
8 evidence in the record. The ALJ accorded the opinions of the health care providers  
9 consulted by Disability Determination Services, as well as psychological  
10 consultative examiner Dr. Genthe, considerable weight because they were supported  
11 by significant evidence in the record. ECF No. 9-2 at 31-32. The ALJ gave little  
12 weight to Dr. Rana’s DSHS evaluation of Plaintiff because Dr. Rana did not have  
13 access to Plaintiff’s medical records, and the evaluation was based on Plaintiff’s  
14 reported symptoms. ECF No. 9-2 at 32. Likewise, the ALJ accorded little weight to  
15 the May 2013 evaluation for DSHS by Plaintiff’s treating physician Dr. Lyzanchuk  
16 because the evaluation “took place during the claimant’s recovery from her February  
17 2013 back surgery, so it was not reflective of her maximum residual functional  
18 capacity.” ECF No. 9-2 at 33. “Furthermore, the objective findings in the record do  
19 not support the conclusion that [Ms. Espino] is unable to lift two pounds or stand  
20 and walk.” *Id.* Ultimately, the ALJ concluded that Plaintiff retained the residual  
21 capacity to perform light work with several limitations, including that Ms. Espino

1 cannot engage in postures such as climbing or crawling, must avoid exposure to  
2 extreme cold or heat, vibrations, and hazards, and can perform only work that  
3 requires little or no judgment and includes simple duties that can be learned quickly  
4 on the job. ECF No. 9-2 at 27. Specifically, the ALJ identified Ms. Espino's past  
5 work as an agricultural sorter as an occupation she would still be able to perform.  
6 ECF No. 9-2 at 33.

7 Although the ALJ concluded that Ms. Espino had retained residual functional  
8 capacity to perform some of her past work at step four, he found alternatively at step  
9 five that Ms. Espino could perform several light, unskilled jobs that are prevalent in  
10 the national economy, including cashier II, cleaner/housekeeper, fast food worker,  
11 assembler, telephone information clerk, and document preparer. ECF No. 9-2 at 34.

12 Therefore, the ALJ found that Ms. Espino is not disabled under the Act  
13 because she is capable of making a successful adjustment to a number of jobs  
14 requiring light and sedentary exertion levels and compatible with her additional  
15 limitations.

## 16 **APPLICABLE LEGAL STANDARDS**

### 17 **A. Standard of Review**

18 Congress has provided a limited scope of judicial review of a Commissioner's  
19 decision. 42 U.S.C. § 405(g). A court may set aside the Commissioner's denial of  
20 benefits only if the ALJ's determination was based on legal error or not supported by  
21 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985) (citing



1 42 U.S.C. § 405(g)). “The [Commissioner’s] determination that a claimant is not  
2 disabled will be upheld if the findings of fact are supported by substantial evidence.”  
3 *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)).  
4 Substantial evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d  
5 1112, 1119 n.10 (9th Cir. 1975), but less than a preponderance. *McCallister v.*  
6 *Sullivan*, 888 F.2d 599, 601-02 (9th Cir. 1989) (citing *Desrosiers v. Secretary of*  
7 *Health and Human Services*, 846 F.2d 573, 576 (9th Cir. 1988)). Substantial  
8 evidence “means such evidence as a reasonable mind might accept as adequate to  
9 support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations  
10 omitted). “[S]uch inferences and conclusions as the [Commissioner] may reasonably  
11 draw from the evidence” will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293  
12 (9th Cir. 1965). On review, the court considers the record as a whole, not just the  
13 evidence supporting the decisions of the Commissioner. *Weetman v. Sullivan*, 877  
14 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir.  
15 1980)).

16 It is the role of the trier of fact, not this court, to resolve conflicts in evidence.  
17 *Richardson*, 402 U.S. at 400. If evidence supports more than one rational  
18 interpretation, the court may not substitute its judgment for that of the  
19 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th  
20 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be  
21 set aside if the proper legal standards were not applied in weighing the evidence and

1 making a decision. *Browner v. Sec’y of Health and Human Services*, 839 F.2d 432,  
2 433 (9th Cir. 1988). Thus, if there is substantial evidence to support the  
3 administrative findings, or if there is conflicting evidence that will support a finding  
4 of either disability or nondisability, the finding of the Commissioner is conclusive.  
5 *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987).

### 6 **B. Definition of Disability**

7 The Social Security Act defines “disability” as the “inability to engage in any  
8 substantial gainful activity by reason of any medically determinable physical or  
9 mental impairment which can be expected to result in death or which has lasted or  
10 can be expected to last for a continuous period of not less than 12 months.” 42  
11 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a Plaintiff shall  
12 be determined to be under a disability only if his or her impairments are of such  
13 severity that Plaintiff is not only unable to do his or her previous work but cannot,  
14 considering Plaintiff’s age, education and work experiences, engage in any other  
15 substantial gainful work which exists in the national economy. 42 U.S.C.  
16 §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both  
17 medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
18 (9th Cir. 2001).

### 19 **C. Sequential Process**

20 The Commissioner has established a five-step sequential evaluation process  
21 for determining whether a claimant is disabled. 20 C.F.R. § 416.920. Step one

1 determines if he or she is engaged in substantial gainful activities. If the claimant is  
2 engaged in substantial gainful activities, benefits are denied. 20 C.F.R. §§  
3 404.1520(a)(4)(i), 416.920(a)(4)(i).

4 If the claimant is not engaged in substantial gainful activities, the decision  
5 maker proceeds to step two and determines whether the claimant has a medically  
6 severe impairment or combination of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
7 416.920(a)(4)(ii). If the claimant does not have a severe impairment or combination  
8 of impairments, the disability claim is denied.

9 If the impairment is severe, the evaluation proceeds to the third step, which  
10 compares the claimant's impairment with a number of listed impairments  
11 acknowledged by the Commissioner to be so severe as to preclude substantial  
12 gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); *see also* 20  
13 C.F.R. § 404, Subpt. P, App. 1. If the impairment meets or equals one of the listed  
14 impairments, the claimant is conclusively presumed to be disabled.

15 If the impairment is not one conclusively presumed to be disabling, the  
16 evaluation proceeds to the fourth step, which determines whether the impairment  
17 prevents the claimant from performing work he or she has performed in the past. If  
18 the plaintiff is able to perform his or her previous work, the claimant is not disabled.  
19 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, the claimant's  
20 residual functional capacity ("RFC") assessment is considered.

1 If the claimant cannot perform this work, the fifth and final step in the process  
2 determines whether the claimant is able to perform other work in the national  
3 economy in view of his or her residual functional capacity and age, education and  
4 past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v.*  
5 *Yuckert*, 482 U.S. 137 (1987).

6 The initial burden of proof rests upon the claimant to establish a prima facie  
7 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th  
8 Cir. 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden  
9 is met once the claimant establishes that a physical or mental impairment prevents  
10 him from engaging in his or her previous occupation. The burden then shifts, at step  
11 five, to the Commissioner to show that (1) the claimant can perform other substantial  
12 gainful activity, and (2) a “significant number of jobs exist in the national economy”  
13 which the claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir.  
14 1984).

#### 15 **D. Treating Physician Rule**

16 The treating physician rule requires that an ALJ give the medical opinion of a  
17 claimant’s treating physician controlling weight if it is well supported by medical  
18 findings and not inconsistent with other substantial record evidence. 20 C.F.R. §  
19 404.1527(c)(2). Although the Commissioner has eliminated the treating physician  
20 rule for claims filed on or after March 27, 2017, 82 Fed. Reg. 5852-53, the rule  
21 applies to Ms. Espino’s claim filed in 2011.

1 The Commissioner may decline to give the claimant's treating physician  
2 controlling weight, only for "clear and convincing reasons" if the treating  
3 physician's opinion is not contradicted by another doctor, or for "specific and  
4 legitimate reasons" supported by substantial evidence in the record, where the  
5 treating physician's opinion is contradicted by another doctor. *Lester v. Chater*, 81  
6 F.3d 821, 831 (9th Cir. 1995). In addition, "the ALJ need not accept the opinion  
7 of any physician, including a treating physician, if that opinion is brief, conclusory,  
8 and inadequately supported by clinical findings." *Bray v. Comm'r of Soc. Sec.*  
9 *Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009) (citation and alteration omitted).

#### 10 **E. Insured Status" Requirement**

11 To be eligible to receive disability insurance benefits, the claimant must  
12 demonstrate that she or he has "insured status" as defined by the Act. *See generally*  
13 42 U.S.C. §§ 414, 423(a), (c); 20 C.F.R. §§ 404.101 et seq.; *Chapman v. Apfel*, 236  
14 F.3d 480, 482 (9th Cir. 2000). A "[c]laimant is not entitled to disability benefits  
15 unless [she or] he can demonstrate that [her or] his disability existed prior to the  
16 expiration of [her] insured status." *Flaten v. Sec. of Health & Human Serv.*, 44 F.3d  
17 1453, 1461, n. 4 (9th Cir. 1995). Deterioration of a claimant's condition after her  
18 insured status expires is "irrelevant." *Id.*

#### 19 **DISCUSSION**

20 As a preliminary matter, the Court notes that Ms. Espino alleges, and revisits  
21 the allegation throughout her motion for summary judgment, that the ALJ erred in

1 primarily considering evidence from 2009 through 2012, prior to Ms. Espino's  
2 second back surgery and during a period in which she abused street drugs, and by  
3 providing "scant reasoning to reject Ms. Espino's condition subsequent to her  
4 amended alleged onset date of April 17, 2012." ECF No. 13 at 18. Plaintiff further  
5 alleged in her letter accompanying her request for review by the Appeals Council:

6 [A]t the hearing with her attorney she amended her onset date to April  
7 17, 2012 when she was done with that period in her life. Instead of  
8 acknowledging the amended onset date with the change in lifestyle the  
9 ALJ attacks credibility based on decision [sic] she made in the past and  
10 obstacles she has overcome. Thus, the credibility findings are  
11 erroneous.

12 ECF No. 9-6 at 329 (internal citation to ALJ's decision omitted).

13 Although the transcript reflects limited discussion between Ms. Espino's  
14 attorney and the ALJ regarding whether Ms. Espino should have amended her onset  
15 date, there is no indication that she actually amended the onset date at the hearing.  
16 ECF No. 9-2 at 73-76; Tr. at 31-35. On appeal to this Court, Ms. Espino  
17 acknowledges that she "did not make clear her onset date was definitely amended to  
18 April 17, 2012 until after the ALJ issued his decision," ECF No. 13 at 18, but still  
19 assigns error to the ALJ's credibility determinations and his alleged overreliance on  
20 Plaintiff's circumstances and health status prior to April 2012.

21 Regardless of when or whether the amendment occurred, amendment of the  
onset date is problematic for Ms. Espino in the context of the insured status  
requirement. The ALJ found that Ms. Espino's earnings record made her eligible for

1 insurance through June 30, 2010, and the parties do not dispute his calculation.  
2 Therefore, Ms. Espino needed to establish disability on or before that date to be  
3 entitled to a period of disability insurance benefits. Ms. Espino's attempt to amend  
4 her onset date to April 17, 2012, whether or not it was effective, indicates that she  
5 acknowledged by the time her case was before the Appeals Council that she was not  
6 disabled as of the date that her insured status expired. That acknowledgement itself  
7 is fatal to Ms. Espino's claims for benefits. *See Flaten*, 44 F.3d at 1461.

8         Nevertheless, the Court also considers Ms. Espino's challenges to the ALJ's  
9 findings on the following grounds.

10         **A. Consideration of Medical Opinions**

11         Plaintiff assigns error to the ALJ's rejection of treating physicians Dr.  
12 Lyzanchuk's and Dr. Rana's opinions that Plaintiff was unable to work and has  
13 severely limited mobility and ability to carry anything more than two pounds.

14         The ALJ's analysis at step four of the sequential process reflects a careful,  
15 exhaustive review of the record and an articulation of specific reasons, based upon  
16 substantial evidence in the administrative record, to decline to accord significant  
17 weight to the opinions of Plaintiff's treating physicians. *See* ECF No. 9-2 at 27-33.  
18 The Court finds no basis to find that the ALJ erred in according the opinions of Ms.  
19 Espino's treating physicians controlling weight.

20         / / /

21         / / /

## B. Credibility Determination

When the ALJ finds that a claimant's statements as to the severity of impairments, pain, and functional limitations are not credible, the ALJ must make a credibility determination with findings sufficiently specific to permit the court to conclude that the ALJ did not arbitrarily discredit claimant's allegations. *Thomas*, 278 F.3d at 958-959; *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9th Cir. 1991) (en banc).

If there is no affirmative evidence that the claimant is malingering, the ALJ must provide “clear and convincing” reasons for rejecting the claimant's symptom testimony. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). The ALJ engages in a two-step analysis in deciding whether to admit a claimant’s subjective symptom testimony. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007); *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996). Under the first step, the ALJ must find the claimant has produced objective medical evidence of an underlying “impairment,” and that the impairment, or combination of impairments, could reasonably be expected to cause “some degree of the symptom.” *Lingenfelter*, 504 F.3d at 1036. If the ALJ determines that the objective medical evidence alone does not substantiate the claimant’s statements about the intensity, persistence, or functionally limiting effects of her symptoms, the ALJ must assess the credibility of the claimant’s statements based upon consideration of the entire record. 20 C.F.R. §§ 404.1527, 416.927; *see also* SSR 96-2p, 1996 SSR LEXIS 9, 61 Fed. Reg. 34489



1 (July 2, 1996); SSR 96-5p, 1996 SSR LEXIS 2, 61 Fed. Reg. 34471 (July 2, 1996);  
2 and SSR 06-3p, 2006 SSR LEXIS 5, 71 Fed. Reg. 45593 (Aug. 9, 2006).

3 Although a history of illegal drug use alone does not undermine a claimant's  
4 credibility, conflicting statements about past drug use has been found to support an  
5 adverse credibility determination. *See Thomas v. Barnhart*, 278 F.3d 947, 959-60  
6 (9th Cir. 2002). In addition, "if a claimant complains about disabling pain but fails  
7 to seek treatment, or fails to follow prescribed treatment, for the pain, an ALJ may  
8 use such failure as a basis for finding the complaint unjustified or exaggerated . . . ."  
9 *Orn v. Astrue*, 495 F.3d 625, 638 (9th Cir. 2007) (citation omitted).

10 The ALJ who determined Ms. Espino's claims appropriately performed his  
11 function as factfinder and identified information and inconsistencies throughout the  
12 record supporting his conclusion that Ms. Espino's subjective reports of her  
13 symptoms were not entirely credible. *See* ECF No. 9-2 at 27-33. Moreover, the  
14 ALJ set forth his reasoning with sufficient particularity to demonstrate that he  
15 considered the entire record and engaged in the inquiries required of him. *See id.*  
16 The Court, therefore, defers to the ALJ's credibility determination.

## 17 CONCLUSION

18 There is substantial evidence supporting the ALJ's determination that Plaintiff  
19 was not disabled during the relevant period. Moreover, Plaintiff's assertion that she  
20 has amended her onset date to nearly two years after the date she was last insured  
21 renders her ineligible for the benefits she seeks.

1 Accordingly, **IT IS HEREBY ORDERED:**

2 1. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is **DENIED**.

3 2. Defendant's Motion for Summary Judgment, **ECF No. 14**, is  
4 **GRANTED**.

5 3. Judgment shall be entered for Defendant.

6 The District Court Clerk is directed to enter this Order, enter Judgment as  
7 outlined above, provide copies to counsel, and **close this case**.

8 **DATED** May 10, 2017.

9 *s/ Rosanna Malouf Peterson*  
10 ROSANNA MALOUF PETERSON  
11 United States District Judge  
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